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**GUIDELINES FOR ECONOMIC ANALYSIS OF
FISHERY MANAGEMENT ACTIONS**

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TABLE OF CONTENTS

	<u>Page</u>
1. INTRODUCTION	1
2. GENERAL FRAMEWORK FOR ECONOMIC ANALYSES OF REGULATORY ACTIONS	4
3. PRELIMINARY REGULATORY ECONOMIC EVALUATION	7
4. REGULATORY IMPACT REVIEW	8
IV.1. Analysis of Alternatives	12
IV.2. General Considerations in Developing the Analysis	18
IV.3. Information Requirements	21
IV.4. Analytical Procedures	23
IV.5. Analysis of Framework Management Measures	23
5. REGULATORY FLEXIBILITY PROCESS AND ANALYSIS	24
V.1. Steps for Fulfilling the RFA Requirements	25
V.2. Small entities Compliance Guide	34
V.3. Waiving or Delaying the Preparation of an RFAA	34
V.4. Relationship of the Regulatory Flexibility Act to Other Applicable Law	35
V.5. Involvement of Small Entities in the Rulemaking	35
V.6. Periodic Review of Rules	36
6. BIBLIOGRAPHIC REFERENCES AND SUGGESTED READINGS	38

APPENDIX A	Summaries of Legislative Requirements Of Other Applicable Law	42
APPENDIX B	Flow Charts describing the typical Regulatory Process	48

GUIDELINES FOR ECONOMIC ANALYSIS OF FISHERY MANAGEMENT ACTIONS

1. INTRODUCTION

The purpose of this document is to provide guidance on understanding and meeting the procedural and analytical requirements of Executive Order (E.O.) 12866 and the Regulatory Flexibility Act (RFA) for regulatory actions of federally managed fisheries. However, much of the guidance provided in this document is relevant for other types of regulatory actions which are subject to E.O. 12866 and the RFA.

The National Marine Fisheries Service (NMFS) complies with the requirements of E.O. 12866 by preparing a Regulatory Impact Review (RIR) which includes an analysis of the economic effects of the proposed action and alternative actions. The RIR is intended to assist the Councils and NMFS in selecting the regulatory approach that maximizes net benefits (including potential economic, environmental, public health and safety, and other advantages; distributive impacts, and equity), unless a statute requires another regulatory approach.

Regulatory Flexibility Act Analysis (RFAA) is necessary to satisfy the requirements of the RFA (5 U.S.C. 601 *et seq.*). The RFAA should assess the impacts of the proposed/final rule on small entities and describe steps the agency has taken to minimize any significant economic impact on small entities while still achieving regulatory goals. The general intent of the RIR and RFAA analytical and process requirements is to make the decision process open and transparent so that all can understand the what, where, and why of regulatory decision-making and can agree that the required steps of the process were followed. The economic analyses provide decision-makers and the public with the agency's best estimates of the impacts of proposed actions and their alternatives.

These Guidelines were developed by a team of NMFS economists, Regional Fishery Management Council (Council) staff, attorneys from the Office of General Counsel/Department of Commerce (OGC/DOC), and attorneys from the National Oceanographic & Atmospheric Administration General Counsel for Fisheries (NOAA/GCF). In comparison to the previous RIR/RFAA guidelines, these guidelines:

- \$ Incorporate the revisions to the Regulatory Flexibility Act made by the Small Business Regulatory Enforcement Act.
- \$ Revise the guidelines the agency will use to certify that a proposed regulation will not have a significant economic impact on a substantial number of small entities.
- \$ Place greater emphasis on the need for the Councils and NMFS to have at their disposal, prior to identifying the preferred alternative, planning documents such as draft economic analyses which should provide information on the economic effects of the selected

alternatives, including effects on small entities. These documents would be a source of information for solicitation of early public comments on the expected effects of the selected alternatives.

- \$ Recognize the many similarities of the analyses required in an RIR and RFAA by providing recommendations concerning key topic areas and organization for the regulatory analyst to consider when developing and revising the regulatory analysis.
- \$ Recognize the growing regulatory emphasis on protected resources and habitat by recommending that analysts highlight, where appropriate, the effects on the non-consumptive uses of fishery, other living marine resources, and the benefits derived from these resources and their habitats.

It is preferred that the RIR and the RFAA be undertaken by those with economic expertise. However, these guidelines are written to ensure that non-economists understand what should be in the RIR and the RFAA. When undertaking the RIR and the RFAA, it is expected that the analyst will make an honest effort to organize all the relevant information and supporting analyses that can be reasonably assembled given the significance of the issue, projected time tables and available resources. At a minimum, the RIR and the RFAA should include a good qualitative discussion of the economic effects of the selected alternatives. Quantification of these effects is desirable but the analyst needs to weigh such quantification against the significance of the issue and available studies and resources. A good qualitative discussion of the expected effects may be better than poor quantitative analyses.

Economic analyses are also required under the Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA), the National Environmental Policy Act (NEPA), the Endangered Species Act (with exception), and other applicable law. The analyst should be aware of these other laws as he/she will often be working with other analysts conducting analyses to meet the analytical requirements of these laws. For example, Section 303(a)(9) of the MSFCMA requires a Fishery Impact Statement (FIS). This includes an analysis of the effects of a proposed action on participants in the fishery, and on fishing communities.

Analyses of regulatory actions for federally managed fisheries should strive to simultaneously meet E.O. 12866, the RFA, and other laws, including MSFCMA, NEPA, and ESA. Brief descriptions of the requirements of these laws are in Appendix A. The analyst should consult guidelines for these other laws contained in the NMFS Rulemaking and the Regulatory Process Notebook that can be obtained from the NMFS Office of Sustainable Fisheries.

Economic analyses done early in the regulatory development process, along with biological, environmental, and social information, allow decision-makers to identify and explore the full range of management alternatives. Integrating the analytical requirements of the RIR, the RFAA, and other economic analyses into the Council and NMFS decision-making process will ensure that the best scientific information available can be used. Decision-makers will have a full suite of information available to make informed decisions for the resources, and for all those who benefit from them.

The level of analysis may be constrained by a lack of available data and quantitative models.

However, the analysis conducted must be sufficient to allow the Council and NMFS, on behalf of the Secretary of Commerce, to make informed decisions and to present, quantitatively or qualitatively, the expected economic effects for the management alternatives under consideration(i.e., the selected management alternatives).

These guidelines identify a step-wise approach that will aid in identifying data requirements and conducting economic analyses for regulatory actions. Although these guidelines focus on economic analyses for meeting the requirements of E.O. 12866 and the RFA, it should be emphasized that the first step in the development of a fishery management plan or a regulatory action for a federally managed fishery (other than identifying the goals and objectives) is a description of the biological, economic, social, and cultural characteristics of the fishery. This integrated multi-disciplinary approach in describing the fishery provides information on the data available and enables the analyst to identify data required for the analyses.

The following sections present details on the process and analyses to satisfy the requirements of E.O. 12866 and the RFA. Section II provides a general framework that could be utilized for economic analyses of regulatory actions. In Section III, the recommendation is made to have a preliminary analysis of the economic effects of the selected alternatives available prior to the determination of the preferred alternative. Sections IV and V describe the specific analytical and procedural requirements for regulatory actions for federally managed fisheries as established by E.O. 12866 and the RFA, respectively.

This document is also likely to serve as a reference document. In this regard, it makes explicit use of cross referencing and indicates to the reader where to turn to for greater details. Also, to aid the reader, there may be some repetition of key ideas or concepts.

II. GENERAL FRAMEWORK FOR ECONOMIC ANALYSES OF REGULATORY ACTIONS

There are several analytical options that economists can use to meet the spirit and requirements of E.O. 12866, the RFA and other applicable law. The appropriate options depend on the circumstances to be analyzed, the availability of data, the experience of the analyst, the accumulated knowledge of the fishery and other potentially affected entities, and the nature of the regulatory action. The options may include but are not limited to complex multi-sector bioeconomic models; sparser static breakeven analysis; theory-informed qualitative descriptions; and other accepted forms of economic analysis. Embodied in these guidelines is the principle that a well developed qualitative analysis may be preferable to a poorly specified complex analytical model. These guidelines do not prescribe methods. Rather, they identify analytical elements that should be addressed and identify the scope of analysis required under applicable law.

A broad framework combining biological information with fishery economics is needed for both qualitative and quantitative analysis of fisheries management actions. Analysis of fishery regulatory actions requires considering the relevant sociological, economic, and biological aspects of a fishery. The economic analyses of the effects of alternative management actions are expected to include both quantifiable measures (to the extent practicable, given the data and other resources available for the analyses) and qualitative measures of the effects that are difficult to quantify, but

nevertheless essential to consider.

There is substantial overlap in the analytical requirements for E.O. 12866 and the RFA. Although benefit-cost analysis is prominent in meeting the intent of E.O. 12866, it also requires broad consideration of the distributive effects and economic burden that may be imposed on individuals, businesses of differing sizes, as well as small communities and governmental entities. Thus the level and general types of analyses required under E.O. 12866 mirror to some extent, that required under the RFA to analyze the effects on small entities.

Meeting the broad analytical requirements of E. O. 12866 requires consideration of both benefits and costs of regulatory alternatives from a National perspective as well as that of the private individual or firm.

Even though the analytical requirements are similar, it is important to keep in mind that the RFA has specific process requirements that are not contained in the E. O. 12866. The converse is also true. Nevertheless, a carefully designed analysis can meet both requirements.

This fishery economic framework involves examining how a regulatory action will affect demand for fishery products or recreational fishing opportunities, the supply of those products, and how these market interactions affect resulting fishing decisions and the underlying biological conditions. Analysis of these considerations may be subdivided into four basic components.

The first component is an analysis of potential changes in prices, quantities produced or consumed, fishing or observational trips, etc., as a result of changing supply and demand conditions in the marketplace. This information can be used to determine consumer surplus for various fishery products or activities and provides a partial measure of net benefits from the fishery. Expected price changes may be characterized using a graphical analysis taking into account levels of imports, exports, domestic landings of substitute and complementary fishery products and other consumer goods, disposable income, and other effects. A quantitative analysis may be substituted for this qualitative approach provided adequate data, resources, and defensible analytical models can be made available, although a complex empirical model is not necessarily needed to analyze a proposed change.

The second component is an examination of the change in revenues and operating costs for firms or individuals in the fishery in response to changes in market, biological conditions, and fishery management regulations. Analysis of firm-level changes provide an indication of how producer surplus may change and, for small entities, the impact of regulatory actions. This firm-level analysis characterizes changes in harvesting costs and outputs in the fishery and may also be used to assess changes in potential industry output levels and fishing season length. Similar analyses can also be developed for the recreational sector and for non-consumptive users of the resource. Provided adequate data and appropriate empirical models are available, a quantitative analysis should be substituted for a qualitative approach.

The third component is an analysis of how the regulation is expected to affect fishing fleets. Fleet size and composition changes in response to market prices, biological conditions, and the regulatory environment. Consideration of price and operating cost changes will permit an evaluation of how fleet size and composition may change. In the absence of either reliable cost or price data, a qualitative discussion of changes in fleet size and composition may be presented. Participation rates within recreational fishing modes and for non-consumptive user groups should be addressed in a similar manner. However, the analyst should strive to characterize these effects

with quantitative information whenever practicable.

The fourth component of this economic framework makes use of the biological analysis that explains the response of the stock or stocks being managed to the proposed regulation. Fishing mortality is a function of effort levels that are determined by market and biological conditions, and fishery regulations. By treating the change in stock size as a factor in the economic objectives of individual fishermen or the fleet as a whole, anticipated changes in fishing effort and its impact on the subsequent size of fish stock can be evaluated. It should be remembered that non-consumptive user groups assign values to the resource. These non-consumptive values may affect the optimal stock size.

By melding these four components into an overall fishery economic framework, a reasoned assessment of the expected direction of change in net benefits to the nation, as well as the specific effects on individual small entities for a proposed regulatory action, may be evaluated. In many cases, the analysis will be comprised of a mix of qualitative and quantitative information. The resulting estimates of the changes in the consumer surplus associated with use and non-use values, vessel profitability, fleet size, employment, and stock abundance may be used by fishery managers to determine if their objectives and goals are achievable and to compare regulatory alternatives.

III. PRELIMINARY REGULATORY ECONOMIC EVALUATION

Although there are no statutory requirements to do so, NMFS recommends that a preliminary evaluation describing the expected economic effects of the selected alternatives be undertaken once the alternatives are developed. This would occur usually before a preferred alternative is identified and certainly prior to final approval by Councils or NMFS of any regulatory action. The primary intent for this recommended analysis is to provide early consideration of economic effects of regulatory action, not to delay or put up roadblocks to action.

In addition, such preliminary economic analyses could be a source of information for solicitation of early public comments on the expected economic effects of the alternatives proposed, and a platform from which information could be obtained to address the requirements of various applicable laws (e.g., E.O. 12866 and the RFA). The preliminary evaluation should be included in the document that goes out to public hearing or for public comment.

For purposes of these guidelines, this preliminary analysis will be labeled a **Preliminary Regulatory Economic Evaluation** (PREE). The PREE should be done at an early stage once the alternatives are developed and usually before a preferred alternative is identified. The PREE should describe the general economic effects that may be reasonably anticipated to occur upon implementation of a management program. In keeping with applicable law (E.O. 12866 and the RFA) these effects may include effects on net benefits, distributive impacts, and how entities (distinguishing between small and large entities) may be affected by the alternatives being proposed.

Depending upon the degree of precision in which the alternatives are specified, and the number and complexity of proposed alternatives the PREE may be largely qualitative or may provide quantitative estimates of economic impact. At a minimum, a qualitative discussion of the expected economic impacts of the proposed alternatives should be provided. A quantitative

analysis may be substituted for qualitative assessments where available data and resources allow. However, given the preliminary nature of the analysis the analyst should use reasoned judgment in determining the level of analysis necessary for a particular issue. Whether a qualitative or quantitative approach or a mixture of the two is used, the PREE should provide the reader with an overall framework for assessing economic impacts.

IV. REGULATORY IMPACT REVIEW

The objective of Executive Order (E.O.) 12866 (58 FR 51735, October 4, 1993) is to improve the Federal regulatory system. NMFS complies with E.O. 12866 by preparing a Regulatory Impact Review (RIR) of proposed regulations. The regulatory philosophy of Executive Order 12866 is reflected in the following statements. Federal agencies should promulgate only such regulations as are required by law, are necessary to interpret the law, or are made necessary by compelling public need, such as material failures of private markets to protect or improve the health and safety of the public, the environment, or the well-being of the American people. In deciding whether and how to regulate, agencies should assess all costs and benefits of available regulatory alternatives, including the alternative of not regulating. Costs and benefits shall be understood to include both quantifiable measures (to the fullest extent that these can be usefully estimated) and qualitative measures of costs and benefits that are difficult to quantify, but nevertheless essential to consider. Further, in choosing among alternative regulatory approaches, agencies should select those approaches that maximize net benefits (including potential economic, environmental, public health and safety, and other advantages, distributive impacts; and equity), unless a statute requires another regulatory approach.

To ensure that the agencies' regulatory programs are consistent with this philosophy, agencies should adhere to the following principles, to the extent permitted by law and where applicable:

(1) Each agency shall identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions that warrant new agency action) as well as assess the significance of that problem.

(2) Each agency shall examine whether existing regulations (or other law) have created, or contributed to, the problem that a new regulation is intended to correct and whether those regulations (or other law) should be modified to achieve the intended goal of regulation more effectively.

(3) Each agency shall identify and assess available alternatives to direct regulation, including providing economic incentives to encourage the desired behavior, such as user fees or marketable permits, or providing information upon which choices can be made by the public.

(4) In setting regulatory priorities, each agency shall consider, to the extent reasonable, the

degree and nature of the risks posed by various substances or activities within its jurisdiction.

(5) When an agency determines that a regulation is the best available method of achieving the regulatory objective, it shall design its regulations in the most cost-effective manner to achieve the regulatory objective. In doing so, each agency shall consider incentives for innovation, consistency, predictability, the costs of enforcement and compliance (to the government, regulated entities, and the public), flexibility, distributive impacts, and equity.

(6) Each agency shall assess both the costs and the benefits of the intended regulation and, recognizing that some costs and benefits are difficult to quantify, propose or adopt a regulation only upon a reasoned determination that the benefits of the intended regulation justify its costs.

(7) Each agency shall base its decisions on the best reasonably obtainable scientific, technical, economic, and other information concerning the need for, and consequences of, the intended regulation.

(8) Each agency shall identify and assess alternative forms of regulation and shall, to the extent feasible, specify performance objectives, rather than specifying the behavior or manner of compliance that regulated entities must adopt.

(9) Wherever feasible, agencies shall seek views of appropriate State, local, and tribal officials before imposing regulatory requirements that might significantly or uniquely affect those governmental entities. Each agency shall assess the effects of Federal regulations on State, local, and tribal governments, including specifically the availability of resources to carry out those mandates, and seek to minimize those burdens that uniquely or significantly affect such governmental entities, consistent with achieving regulatory objectives. In addition, as appropriate, agencies shall seek to harmonize Federal regulatory actions with related State, local, and tribal regulatory and other governmental functions.

(10) Each agency shall avoid regulations that are inconsistent, incompatible, or duplicative with its other regulations or those of other Federal agencies.

(11) Each agency shall tailor its regulations to impose the least burden on society, including individuals, businesses of differing sizes, and other entities (including small communities and governmental entities), consistent with obtaining the regulatory objectives, taking into account, among other things, and to the extent practicable, the costs of cumulative regulations.

(12) Each agency shall draft its regulations to be simple and easy to understand, with the goal of minimizing the potential for uncertainty and litigation arising from such uncertainty.

Key Elements of the Regulatory Impact Review

The key elements of the Regulatory Impact Review (RIR) include:

- \$ A description of the management objectives.
- \$ A description of the fishery.
- \$ A statement of the problem.
- \$ A description of each selected alternative¹, including the A no action@alternative.
- \$ An economic analysis of the expected effects of each selected alternative relative to the baseline².

If these elements are already included in another section of the document, the appropriate section must be referenced under the RIR.

If a proposed action is determined to be significant under E.O. 12866, the analysis undergoes further scrutiny by the Office of Management and Budget (OMB) to ensure that it meets the requirements of E.O. 12866. A significant regulatory action@means any regulatory action that is likely to result in a rule that may:

- \$ Have an annual effect on the economy of \$100 million or more or adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities;
- \$ Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency;
- \$ Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or
- \$ Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in the Executive Order.

¹ Throughout this document, the term A selected alternative(s)@ is used to refer to the alternative(s) a Council or NMFS determines will be analyzed in the RIR.

² The baseline is what is likely to occur in the absence of the proposed action, i.e., the status quo.

RIR AObjectives@Section

The management objectives should be discussed or referenced so that they can be utilized as criteria in the evaluation of the potential success or failure of alternative management measures.

Fishery management objectives must often take into account the requirements of multiple laws and mandates, such as the MSFCMA, E.O. 12866, the RFA, National Environmental Policy Act, Unfunded Mandates Reform Act, Endangered Species Act, Marine Mammal Protection Act, and Migratory Bird Treaty Act. These laws and mandates should be referenced as appropriate. A summary of the requirements of these other applicable law is included in Appendix A.

RIR ADescription@Section

The description of the fishery should include a description of how the fishery is conducted, utilization pattern, trends, observed deviations, and current status. This description should provide managers with insight into who is fishing, when and where fishing occurs, what species are targeted and caught, the numbers and sizes of businesses involved in the fishery and supporting activities, and relationship of various segments of the affected industry.

RIR AProblem Statement@Section

The problem statement should identify the problem that it intends to address (including, where applicable, the failures of private markets or public institutions, that warrant new action by the agency) as well as assess the significance of that problem. It should also examine whether existing regulations(or other law) have created, or contributed to, the problem that a new regulation is intended to correct and whether those regulations (or other law) should be modified to achieve the intended goal of regulation more effectively.

RIR AAlternatives@Section

The analyst does not select alternatives to be included in the regulatory document. The Council or NMFS is required to ensure that a range of feasible alternatives is included in the regulatory document. Although there is no minimum number of alternatives that must be analyzed, the Council or NMFS should consider the "no action" alternative and the most significant of the alternatives. The ~~Ano action@~~alternative should be the basis of comparison for other alternatives. However, the ~~Ano action@~~alternative does not necessarily mean a continuation of the present, but instead is the most likely scenario for the future in the absence of other alternatives.

Sometimes, alternatives are eliminated from further consideration early in the regulatory process. Examples include alternatives that are determined to be infeasible for various reasons. To enhance the administrative record, these eliminated alternatives should be included in an appendix to the final document with a brief explanation of the reasons for them being eliminated from further consideration.

Each selected alternative should be described completely. Information should be presented in detail on the measures to be imposed, the process of implementing the measures, and the timing for implementation.

IV. 1. Analysis of Alternatives

The objective of the analysis is to describe clearly and concisely the economic effects of the

various alternatives. This will enable the agency to determine the regulatory alternative that maximizes net benefits to society, including potential economic, environmental, public health and safety, and other advantages, distributive impacts, and equity. In theory, economic analysis can quantify most of the changes in net benefits expressed in monetary terms. It can also be used to estimate distributive impacts and determine if a specific change in the distribution of benefits and costs is **Apositive@**or **Anegative@**based on an accepted criteria³. Therefore, if there are substantial distributive impact differences among the alternatives, the analysis can estimate the expected economic effects of the selected alternatives, and can provide an estimate of the differences in net economic benefits among the selected alternatives.

As a basis for estimating the effects of the management measures, the analyst should compare, in a straightforward manner, how the fishery and its various components would operate under each selected alternative. The cumulative impact of each selected alternative within a management measure must be analyzed to the extent practicable. The analyst should also consider each element of a proposed measure separately when a selected alternative contains a number of distinct measures. For example, if a Council proposes three separate alternatives for a fishery that each include minimum fish size, possession limit / trip limit, and closed season, then the individual and combined effects of each management measure should be analyzed by alternative. The components of the analysis are described below.

Identification of Expected Effects

The types and direction of expected effects on the living marine resource, their habitat and those that benefit from these resources should be discussed. The types of effects to consider include the following:

- \$ Changes in net benefits within a benefit-cost framework.
- \$ Changes in benefits and costs of groups of individuals, businesses of differing sizes, and other entities (including small communities and governmental entities).
- \$ Changes in income and employment in fishing communities.
- \$ Changes in other social concerns.

Such effects are the product of regulatory action-induced changes to the following:

- \$ The goods and services that are available from the use and existence of living marine resources and the benefits they provide.

³ This criteria could be pareto optimality, compensation criteria (winners are required to compensate losers), or compensation criteria where compensation does not actually occur.

\$ The factors of production (e.g., capital, labor, and living marine resources) used to provide those goods and services, the cost of, and returns from using the factors of production, and the payments made for their use.

Changes in net benefits within a benefit-cost framework

Benefit-cost analysis is conducted to evaluate the net social benefit arising from changes in consumer and producer surpluses that are expected to occur upon implementation of a regulatory action. The proper comparison is >with the action= to >without the action= rather than >before and after the action=, since certain changes may occur even without action and should not be attributed to the regulation. In general, benefits are measured by willingness to pay (WTP) and costs by opportunity costs. Opportunity costs reflect the foregone benefits from the use of social resources in one activity as compared to the next best use.

Benefits may accrue as surpluses to producers or consumers. Gross benefits are the amount that individuals are willing to pay, which is the sum of individual's consumer surplus (CS) plus revenue (price times quantity). CS is the difference between the price consumers are willing to pay for a product and the price they actually pay. Thus CS represents net benefits to consumers. Net benefit to a producer is the producer surplus (PS). PS is the difference between the economic cost producers bear to supply a market and the price they actually receive. Economic costs are measured by the opportunity cost of all resources including the raw materials, physical and human capital used in the process of supplying these goods and services to consumers.

Benefits and costs may accrue to producers or consumers not only through their own direct activity, but through changes in public expenditures or receipts that may redirect resources for use elsewhere in the economy. From a social perspective, many public expenditures represent transfer payments in that they do not require consumption of any additional resources. However, the public provides a variety of services that do have value. For example, enforcement of fishery regulations provides economic benefits in that enforcement enters into compliance behavior and greater compliance provides greater assurance that the regulation will achieve its intended purpose. From a budgetary perspective, the cost of enforcement is equivalent to the total public expenditure devoted to enforcement. The economic cost of enforcement is measured by the opportunity cost of devoting resources to enforcement vis à vis some other public or private use and/or the opportunity cost of diverting enforcement resources from one fishery to another.

Benefits and costs are measured from the perspective of society rather than from that of private firms or individuals since the accounting stance is the nation as a whole. Benefits enjoyed by other nations are not included, although tax payments by foreign owners and export revenues are benefits to the nation. Because of the national accounting stance, opportunity costs (whenever possible) rather than accounting costs are employed. Forgone interest, depreciation, some taxes, and subsidies are considered transfer payments from the perspective of society rather than expenditures of real resources, and hence are considered private rather than economic costs. Secondary costs and benefits are generally excluded when opportunity cost or WTP is used to measure costs and benefits, since their inclusion would be double counting. For example, the benefits of a stock rebuilding program may be reflected in increased values of participating vessels.

Provided economic costs and benefits are measured as opportunity costs and WTP respectively, the capital gains associated with increased vessel value would already be reflected in the benefit-cost analysis. If the analyst were to also add the increased value of capital assets, this would count the program benefits twice.

If there are no market distortions and all goods are traded in markets, CS and PS can, at least theoretically, be measured or approximated by market demand and supply curves. PS can alternatively be calculated from revenue and cost data using opportunity rather than accounting costs.

When there is market failure or relevant market distortions, such as through non-competitive markets, market supply and demand curves and market prices are biased. The extent of the bias depends on many factors. It will often not be possible to measure the effect of these distortions, but their possible existence and direction of bias should be noted where applicable. A sensitivity analysis can help shed light on the importance of the bias.

Not all benefits and costs important to consumers are exchanged through markets and receive market prices, such as environmental amenities or public goods. These non-market benefits and costs can be categorized by whether they provide consumptive or non-consumptive use value (sometimes called direct and indirect use value) or non-use value. Non-use value includes existence value, which is the WTP for the existence of a good or service over and above the WTP for potential or actual use of a good or service. Including these non-market benefits and costs is particularly important when considering habitat, ecosystem, and many marine mammal issues. Wherever practicable, these non-market benefits and costs should be given monetary values as a consumer's WTP using non-market valuation techniques such as travel cost, stated preference, and hedonic methods.

For economic analysis of regulatory actions, changes in net benefits are measured by the difference in the present value of the discounted stream of net benefits of regulatory action as compared to the status quo. In this context, a positive result means that the net present value of the regulatory action exceeds that of the status quo. Conversely, a negative result indicates that the status quo yields higher net present value than the regulatory action. Given that the principle purpose for the analysis is an assessment of how net benefits may be expected to change relative to the status quo, the analyst may choose to focus only on those economic costs and benefits that are expected to change. If, for example, fixed costs for fishing firms are expected to be unaffected, then any change in costs may be fully captured by changes in operating costs thereby obviating the need to estimate fixed costs. Similarly, if retail market supplies are not expected to change due to ready availability of imports then a given regulatory action may have little or no impact on consumers. In this instance, changes in net benefits will be fully captured by factors other than consumer surplus.

In instances where benefits are considered equivalent regardless of the regulatory choice and/or where a specific action is mandated by statute or some other binding ruling a cost-effectiveness analysis may be used to make comparisons across alternatives. A cost-effectiveness analysis does not seek to determine whether or not regulatory action is warranted. Rather, a cost-effectiveness analysis seeks to find the regulatory design that minimizes costs. Where appropriate, a cost-effectiveness analysis can be used to rank regulatory alternatives as compared to the status quo.

Changes in the distribution of benefits and costs

Changes in the distribution of benefits and costs reflect changes in the benefits and costs of groups of individuals, businesses of differing sizes, and other entities (including small communities and governmental entities). For businesses, the change in accounting profit can be used as a measure of the change in net benefits. Profit is a widely used term but is generally understood to be the result of subtracting costs from gross receipts over a period of time. Defined in this manner, calculation of profit will be affected by differences in both cost accounting conventions as well as accounting conventions applied to gross receipts. Similarly, the change in net benefits to governmental entities can be measured in terms of changes in revenues and costs using normal accounting practices.

The change in net benefits to consumers can be measured in terms of the change in consumer surplus, just as it would be measured in a benefit-cost analysis.

Changes in income and employment

Regional economic models, including input-output models, can be used to estimate the regional income and employment effects of alternative regulatory actions. These models provide measures of the changes in economic activity by region, not measures of net benefits. In the absence of these models that can take substantial time and effort to develop and update, base sector models can be used or qualitative assessments can be made.

Changes in other social concerns

The changes with respect to social concerns that are not captured in the preceding categories of effects should be addressed. Such concerns may be explicitly or implicitly identified in the problem statement or they may arise during the development and review of alternative management actions.

1. Qualitative Analysis of Expected Economic Effects

At a minimum, a qualitative analysis of the expected economic effects of each selected alternative to the status quo is required. In developing this section, the analyst first defines the baseline or "no action" condition, which provides the standard against which all other alternative actions are compared. The baseline is what is likely to occur in the absence of any of the proposed actions. Once the baseline condition is established, the incremental economic effects of each alternative relative to the baseline can be assessed. The specific economic effects to be analyzed should fall under the general areas of concern identified above.

When quantifiable measures of the effects cannot be usefully estimated given the data and other resources available for the analyses, the types and models that would be required to usefully estimate such measures should be identified.

2. Quantitative Analysis of Expected Economic Effects

If adequate data and model are available to provide useful estimates of quantifiable measures of the expected economic effects, quantitative analysis of the effects of the selected alternatives should be substituted for the qualitative analysis described above. The quantitative

analysis should be as rigorous as practicable using generally accepted methods to provide an understanding of the economic consequences of the selected alternatives. In many cases only a small amount of quantification will be practicable. The analyst should make a concerted effort to quantify the analysis to the extent practicable, given the available data and models, and other constraints. This could include presenting empirical analysis from previously published sources, focus group input or expert opinion groups, as well as the analyst's own economic analysis. Good management requires that an effort be made to provide reasonably precise comparisons of alternative management options.

Summary of Expected Economic Effects

E.O. 12866 defines net benefits in terms of potential economic, environmental, public health and safety, and other advantages, distributive impacts; and equity. With this very broad definition of net benefits in mind, the incremental benefits and costs of all alternatives considered relative to the "no action" alternative as a base line should be summarized. This should include a schedule that: 1) lists all benefits and costs of each alternative, either monetized or non-monetized; 2) identifies when the benefits and costs would occur; and 3) identifies to whom the benefits and costs would accrue. All monetized benefits and costs should be in terms of the present value and should be presented as incremental changes relative to the baseline. Plausible ranges of estimates of benefits and costs should be provided where the estimate is sensitive to uncertain parameters, such as the rate of compliance, the rate of biological recovery or other relevant variables.

IV. 2. General Considerations in Developing the Analysis

1. Forecasting

Evaluation of alternative actions should be based on the most likely conditions expected to exist in the future with and without the proposed management actions. The forecast uses analysis of conditions expected to prevail without the proposed rule. The expected conditions may well differ from the existing conditions.

Forecasts should be made for selected years over the period of the analysis (see Section c below) to indicate impacts of changes in economic and other conditions. During the period of analysis, if national or regional economic conditions are expected to change significantly, the changes should be factored into the analysis. For example, in the analysis of short-term effects, factors such as resource availability, utilization, and mobility are considered in the analytical framework.

2. Discount Rates

The costs and benefits that result from regulations usually occur at different times. Capital investments and some costs required by regulations tend to be concentrated at the outset, whereas benefits often occur at later dates. Some method must be used to permit comparisons between costs and benefits that have different time profiles. Discounting, which transforms future benefits and costs into "present values," should be utilized where appropriate. Direct comparisons between costs and benefits incurred at different time periods can then be made. The social discount rate used in an economic analysis may differ from the interest rate used in a private, accounting analysis.

The Office of Management and Budget (OMB) has provided "Guidelines and Discount Rates for Benefit-Cost Analysis of Federal Programs" in Circular Number A-94 distributed by Transmittal Memorandum Number 64 (October 29, 1992). This Circular specifies certain discount rates that will be updated annually when the interest rate and inflation assumptions in the budget are changed. The goal of this circular is to promote efficient resource allocation through well-informed decision-making by the Federal Government. It provides general guidance for conducting benefit-cost and cost-effectiveness analyses. It also provides specific guidance on the discount rates to be used in evaluating Federal programs whose benefits and costs are distributed over time. The general guidance will serve as a checklist of whether an agency has considered and properly dealt with all elements for sound benefit-cost and cost-effectiveness analyses. Copies of the Circular may be obtained from the OMB Publications Office (202-395-7332). *This information can also be obtained from OMB website at:*

<http://www.whitehouse.gov/OMB/circulars/a094/a094.html>

Section 8.b.1. of the Circular specifies a real discount rate of 7 percent for computing net present value (NPV) when doing constant-dollar benefit-cost analyses of proposed investments and regulations.

The OMB circular encourages the analyst to present sensitivity analyses using other discount rates if the use of such alternative rates can be justified. An alternative that is often used is the social rate of time preference.⁴ Special approaches may also be appropriate when comparing benefits and costs across generations. One approach is to follow the discounting method discussed above but to address the inter-generational equity and fairness issues explicitly rather than by modifying the discount rate.

c. Period of Analysis

A general guideline for the period of analysis cannot be established for all fishery management actions since there is such a wide diversity of possible situations and measures to be dealt with. The analyst will determine the appropriate period over which the analysis will be conducted, but in all cases must provide an explanation of the specific period chosen that conforms

⁴ The social rate of time preference reflects the discount rate at which society is indifferent between a payment now and a correspondingly larger payment in a future year. It may be lower than the average real return on investment because, as a result of taxes and other distortions, individuals do not receive the full return on their investments. Most analysts use the average real rate on long-term Treasury bonds to represent the social rate of time preference. For the last 15 years, this rate has been in the range of 3 to 5 percent.

with accepted benefit-cost analysis practices. For example, the period of analysis could reflect the time it takes for the fishery to move from its initial equilibrium along the expansion path to the final equilibrium (including the time needed for the present value of cost and benefits to approximate zero) due to the adoption of the proposed regulation, holding all other influence constant. In some cases, the lack of necessary data will limit the period of analysis. However, a reasonable attempt should be made to conduct the analysis over a sufficient period of time to allow a consideration of all expected effects. Choosing a period of analysis that is too short may bias the analysis towards costs where costs are incurred in the short-term and benefits are realized later. The period of the analysis should be the same for each alternative, including the "no action" alternative (i.e., all alternatives should be analyzed over the time frame that is appropriate for the alternative having the longest stream of costs and/or benefits).

d. Risk and Uncertainty

The results of economic impact analyses should be examined to evaluate the uncertainty inherent in the data or various assumptions. Areas of sensitivity should be described clearly so that decisions can be made with knowledge of the degree of reliability of the information presented. Situations of risk are defined as those in which the potential outcomes can be described in reasonably well-known distributions of benefits and costs. Situations of uncertainty are defined as those in which potential outcomes cannot be described in objectively known probabilities. Reducing risk and uncertainty may involve increased costs or loss of benefits. The benefits and costs of reducing risk and uncertainty should be considered in the analytical and decision-making process.

Three fundamental types of analyses are possible. First, areas of risk and uncertainty can be qualitatively described. These qualitative descriptions are especially appropriate when reliable economic data or analytical models are unavailable. Second, a formal sensitivity analysis can be conducted in which important parameters are systematically varied and the impact on expected economic effects evaluated. Sensitivity analysis most frequently varies key variables one at a time. Third, a formal risk analysis can be conducted through Monte Carlo simulation. A formal risk analysis provides expected values and distributions for a given probability distribution. A key consideration is the possible correlation among variables and the appropriate level of aggregation of variables. The use of conservative or best estimates, or the use of a risk premium added to the social discount rate is not recommended.

IV.3. Information Requirements

The regulatory analysis should indicate how the important performance characteristics of the fishery will likely change, on a year-by-year basis, if:

- (i) there are no changes in the regulations, and
- (ii) how the same variables change with each selected alternative.

Given the analytical requirements of the MSFCMA and other applicable laws, an economic analysis related to the performance of the relevant commercial and recreational users, non-consumptive users, processing sector, and retail or other market sectors is needed for the same period of time as the biological estimates. At a minimum, a qualitative analysis should discuss the relative magnitude of changes in performance. To the extent practicable, the qualitative components of the analysis should be replaced with quantitative component. The following are

examples of factors for which information should be collected if relevant to the analysis and if the information is available. Information should be tailored to the sector(s) being analyzed, including commercial fishing and processing, recreational and subsistence fishing, and non-consumptive uses of fishery resources.

- \$ Expected levels or changes in participation (number of fishing vessels and/or anglers, etc.) and activity (number of fishing trips, days at sea, etc.).
- \$ Expected levels or changes in harvests (commercial, recreational, and subsistence) and their distribution by sector.
- \$ Expected levels or changes in non-consumptive availability of the resource (e.g., number of whales seen per trip).
- \$ Expected changes in prices (commercial ex-vessel prices and recreational access prices (e.g., charter fees)).
- \$ Expected changes in harvesting costs (fixed and variable costs, including capital and labor costs), as well as equivalent costs for non-consumptive use activities.
- \$ Expected levels and costs of processing.
- \$ Expected changes in benefits or costs incurred by specific user groups, including effects on small entities.
- \$ Expected effects on employment.
- \$ Expected effects on profits, competitive position, productivity or efficiency of individual fishermen or user groups.
- \$ Expected effects on the reporting burden.
- \$ Expected impacts on recreational and subsistence use, including changes in participation and catch rates, and to the extent practicable, their consumer surplus and for subsistence fishing, food and cultural availability.
- \$ Expected management and implementation costs attributable to the action, including enforcement costs.
- \$ Expected effects on non-consumptive use values.

The above factors should be addressed in as much detail as practicable to enable the incremental economic effects associated with each alternative to be determined.

IV. 4. Analytical Procedures

In general, the complexity of the analytical framework that should be used depends on the scope and magnitude of the problem, the number of regulatory alternatives, and the ability to measure the economic effects.

Generally accepted methodologies should be used in determining the economic effects of each selected alternative. This will help the analysis survive peer review and help the rule survive possible legal challenges. Specific methodologies for examining the economic effects of alternative management actions are not detailed here because such methodologies are well documented elsewhere (see bibliographic references and suggested readings for literature on methodologies).

IV. 5. Analysis of Framework Management Measures

The purpose of a framework measure is to "build in" flexibility to provide the opportunity to adjust to problems caused by the natural variability of a fishery and/or the lack of complete information early in the decision-making process.

NMFS Operational Guidelines for the Fishery Management Plan Process require that every framework measure be analyzed and that the analysis be available to the public for comment at some time prior to implementation. The analysis may be provided at the same time the framework is added to the FMP, or it may be provided subsequently when the framework action is actually taken. The extent of analysis, notification, and comment required will depend on the specificity and analysis provided when the framework was established.

The critical decision points where flexibility is required must be identified in framework measures. Also, the exact manner in which the framework will allow decisions to be made at those points must be described. It is necessary to show how this framework and its decision process will affect expected or average values of the important variables under various management alternatives.

When no further analysis is provided for proposed measures under a framework action, the analyst should clearly show that the current situation in the fishery has not changed from the time the analyses were done, and that the specific regulatory action to be taken under the framework was analyzed adequately.

V. REGULATORY FLEXIBILITY ACT PROCESS AND ANALYSIS

The purpose of the Regulatory Flexibility Act(RFA)(5 U.S.C. 601 et seq.)is to establish as a principle of regulatory issuance that agencies shall endeavor, consistent with the objectives of the rule and of applicable statutes, to fit regulatory and informational requirements to the scale of businesses, organizations, and governmental jurisdictions subject to regulation. To achieve this principle, agencies are required to solicit and consider flexible regulatory proposals and to explain the rationale for their actions to assure that such proposals are given serious consideration.

With the exception discussed below, the RFA requires agencies to conduct an Initial Regulatory Flexibility Analysis (IRFA) and Final Regulatory Flexibility Analysis (FRFA) for each proposed and final rule, respectively. The IRFA and FRFA are designed to assess the impacts various regulatory alternatives would have on small entities, including small businesses, and to determine ways to minimize those impacts. Under the RFA, an agency does not need to conduct an IRFA or FRFA if a certification can be made that the proposed rule, if adopted, will not have a significant economic impact on a substantial number of small entities.

It should be emphasized that the RFA does not contain any decisional criterion in terms of choosing the alternative with the least cost or with the least impact on small entities, as the preferred alternative. The purpose of the RFA is to inform the agency, as well as the public, of the

expected economic impacts of the various alternatives contained in the FMP or amendment (including framework management measures and other regulatory actions), and to ensure that the agency considers alternatives that minimize the expected impacts while meeting the goals and objectives of the FMP and applicable statutes.

The Small Business Administration asserts that a good regulatory flexibility analysis will ensure that:

- (1) Reasonable alternatives from among which to select a proposal are identified.
 - (2) The proposal selected reflects a wise choice from among reasonable alternatives.
 - (3) Managers have fair warning if their proposal will generate loud complaint.
 - (4) The proposal competes well against other social goals, regardless of legislative mandates, in light of other administration priorities.
 - (5) The proposal will move rapidly through the regulatory process at OMB and SBA's Office of Advocacy.
 - (6) The proposal will withstand legal challenges under the Administrative Procedure Act, including review of regulatory flexibility analysis (SBA Practitioner's Manual, Draft version 1.4 of March 1999).
- There is some uncertainty as to whether an RFAA is required to address the impacts of a proposed rule on only regulated small entities (i.e., small entities to which the rule will apply) or on all affected small entities. The uncertainty results from the use of the terms such as "small entities to which the proposed rule will apply," "small entities that will be subject to the regulation," "the impact of the proposed rule on small entities," and "a significant economic impact on a substantial number of small entities." The ambiguity results from the use of the latter two terms. The importance of this ambiguity is decreased substantially, if not eliminated, by the fact that E.O. 12866 requires analysis of the burden of regulations on small entities. This requirement is contained in the eleventh principle. Thus, if the economic impact on all small entities that would be affected by the proposed rule is analyzed in the RIR as required by E.O. 12866, the RFAA need only analyze the economic impact on small entities to which the proposed rule will apply.

V. 1. Steps for Fulfilling the RFA Requirements

The steps for conducting the Regulatory Flexibility Analysis (RFAA) may be done in a number of ways, with responsibilities shared between the Councils, NMFS Regions and Centers, and Headquarters offices, but ensuring that there is an adequate Regulatory Flexibility Analysis is ultimately the responsibility of NMFS.

Part 121 of Title 13, Code of Federal Regulations (CFR), sets forth, by Standard Industrial Code (SIC) categories, the maximum number of employees or maximum average annual receipts a business may have to be considered a small entity. Provision is made for an agency to develop industry specific definitions. Under this provision NMFS (with the approval of the SBA)

established criteria for businesses in the fishery sector to qualify as small entities. The Small Business Administration Size Classification by SIC code is available on the following web site: www.sba.gov/regulations/siccodes/

The Regulatory Flexibility Act recognizes and defines **three** kinds of small entities--small businesses, small organizations, and small governmental jurisdictions.

Applying Part 121 of Title 13, CFR size standards to the RFA definitions, any fish-harvesting or hatchery business is a **small business** if it is independently owned and operated and not dominant in its field of operation (including its affiliates) and if it has annual receipts not in excess of \$3.0 million. For related industries involved in canned and cured fish and seafood or prepared fish or frozen fish and seafoods, a **small business** is one that employs 500 employees or less. For the wholesale industry, a small business is one that employs 100 or less. For marinas and charter/party boats, a **small business** is one with annual receipts not in excess of \$5.0 million.

A **small organization** is any not-for-profit enterprise that is independently owned and operated and not dominant in its field.

A **small government jurisdiction** is any government or district with a population of less than 50,000.

Although, at a minimum, the RFA requires a bifurcation between small and large entities, the analyst may choose to create classes or tiers from among the identified universe of small entities. The creation of separate classes of small entities may be appropriate when a regulatory action is expected to have differential impacts on firms based on their size. For example, smaller vessels may be less able to adapt to a regulatory action than larger vessels due to their limited range. At a minimum, the analyst is advised to distinguish between small entities that, while subject to regulation, may or may not be affected because they may not be a fishery participant.

1. Certification Process

The Regulatory Flexibility Act allows Federal agencies to decide whether to conduct full Regulatory Flexibility Act Analysis (RFAA), or whether to certify that the proposed rule would not have a significant economic impact on a substantial number of small entities.⁶ Clearly, there are some advantages if the agency can certify. The agency does not have to do an initial regulatory flexibility analysis (IRFA), a final regulatory flexibility analysis (FRFA), a Small Entity Compliance Guide⁷ (Guide), and a periodic review of such rules. Furthermore, the Administrative Procedures Act (Section 553a) may allow certification of international agreements pertaining to highly migratory species or straddling stocks without substantive analysis of impacts. However, the decision to certify does not eliminate the need to consider the economic effects on small entities as required by E.O. 12866.

The information from the Preliminary Regulatory Economic Evaluation (PREE) or other relevant economic analysis will either indicate there is or there is not a factual basis to certify that the preferred alternative would not have a significant economic impact on a substantial number of small entities.⁸ When the first outcome is obtained, the agency has an option of certifying.

It is recommended that the decision on whether or not to attempt certification / apply certification criteria be made after the final decision has been made on the preferred alternative. This will ensure that this process is done only once for a particular regulatory action.

The NMFS Regional Administrator/Office Director, using analyses and rationale provided by the Council or NMFS, prepares a memorandum from the Chief Counsel for Regulation (CC/Regs) of the Department of Commerce to the Chief Counsel for Advocacy of the Small Business Administration (SBA) certifying and setting forth the factual basis for the certification. Generally, the body of the letter is quoted in the classification section of the proposed rulemaking. The CC/Regs will sign and transmit the certification to SBA at the time the notice of proposed rulemaking or final rulemaking is published in the Federal Register, along with a statement providing factual basis for such certification.

A boilerplate notice language should not be used by the agency in its statement on the factual basis for a certification or in the equally important ancillary requests for public comment. If the agency has conducted the appropriate analysis, it can offer clear, concise, declarative statements that address each of the six points below and reflect the specifics of the proposed rule.

The Office of Advocacy of the Small Business Administration recommends that the certification statement include the following:

1. A statement of basis and purpose of the rule. This should include the statutory basis for the regulation, and the objectives of the rule including a brief description of the context.
2. A description and estimate of number of small entities to which the rule applies. This should describe how the universe of regulated entities was determined (and segmented) and details on the relevant economic and functional characteristics of those entities. This element should provide clear information on the range and scope of the regulation and the analysis which supports the certification.
3. An estimate of economic impacts on small entities, by entity size and industry. This should include the rationale for the certification decision, based on the criteria specified in the next element, as well as a summary of the basic analysis supporting that determination. The emphasis is on financial analysis rather than economic (opportunity cost) analysis, per se, although in some circumstances, there may be relative small differences between the two. The analysis should be presented in a manner which enhances public review.
4. An explanation of the criteria used to evaluate whether the rule would impose significant economic impacts. These guidelines suggest two criteria to consider in determining the significance of regulatory impacts, namely, disproportionality and profitability. These criteria relate to the basic purpose of the Regulatory Flexibility Act, i.e., to consider the effect of regulations on small businesses and other small entities recognizing that they are frequently unable to provide short-term cash reserves to finance operations through several months or years until the positive effects of a regulation pay off. If either criterion is met, the rule should not be certified.

Disproportionality:

Do the regulations place small entities at a significant competitive disadvantage to large entities? If the answer is **Yes**, the rule should not be certified.

Whenever a disproportional effect on profits, costs, or net revenues is expected to occur, the test is adjudged to be met and the rule should not be certified.

This criterion compares the effect of the regulatory action between small and large entities (using the SBA approved size definition of **Asmall@entity**), not the difference between segments of small entities.⁵ However, if an appreciable segment of small entities is disproportionately affected relative to large entities, even if the average small entity is not affected, the test would be adjudged to be met and the rule should not be certified.

Profitability:

Does the regulation **significantly** reduce profit for the regulated entity? If the answer is **Yes**, the rule should not be certified.

The thrust of the analysis should be short- and medium-term in nature. While one year may be considered short-term, the analyst may consider shorter periods, e.g., six months for which the fishery is open, or longer periods, e.g., two years after which the regulation sunsets. Whichever period is selected, the analyst must provide a rationale for that choice as well as a discussion of how the findings may be affected by the choice.

Profit is a widely used term but is generally understood to be the result of subtracting costs from gross receipts over a period of time. Defined in this manner, calculation of profit will be affected by differences in both cost accounting conventions as well as accounting conventions applied to gross receipts. In general the analysis should focus on the ability of the firm to meet both short-term (operating costs plus payments on other short-term obligations) and long-term debt (principal and interest payments on plant and equipment) obligations using generally accepted accounting practices(GAAP)for the regulated industry. The selected accounting practices will depend upon available data. Whichever accounting rules are selected the analyst must describe the assumptions and should discuss how the findings may be affected by these assumptions.

Ultimately, the question the regulatory flexibility analysis needs to answer is whether in the short- and medium-term, the costs (or reduction in revenues) imposed by the regulation can be absorbed by the firm (due to higher than average profitability) or passed on to its customers. If these costs (or reduction in revenues) cannot be absorbed so that either profits are reduced significantly or the solvency (ability to meet long term debt payments) of the firm is clearly threatened then the

⁵ *Impacts within segments of small entities can be evaluated by the second criteria.*

impact of the rule is significant and the agency should not certify.

5. An explanation of the criteria used to evaluate whether the rule would impose impacts on a substantial number of small entities.
The term "substantial number" has no specific statutory definition and the criterion does not lend itself to objective standards applicable across all regulatory actions. Rather, "substantial number" depends upon the context of the action, the problem to be addressed, and the structure of the regulated industry. The SBA casts substantial within the context of "More than just a few" or *De Minimis* ("too few to care about") criteria⁶. In some cases consideration of substantial number may go beyond merely counting impacted entities. In some instances there may be a large number of fishery participants but only a few of these participants may account for the majority of landings. In such cases, a regulatory action may be adjudged to impact a substantial number of small entities even though there may be a large number of insignificantly impacted entities while only a small number of entities are significantly impacted.
Generally, a rule may be determined to affect a substantial number of entities if the rule is controversial, impacts more than just a few entities, or affects the structure of the regulated industry even though only a small number of entities may be impacted.
6. A description of, and an explanation of the basis for, assumptions used.
This should describe the data sources and analytical methods used in the analyses, variability and uncertainty in the cost and revenue estimates, and an explanation of any assumptions used. When assumptions are used, the analyst should indicate the extent to which the results were affected by those assumptions.

2. Initial Regulatory Flexibility Analysis

Section 603 (b) of the Regulatory Flexibility Act provides the elements that should be included in the Initial Regulatory Flexibility Analysis (IRFA). These are:

A description of the reasons why action by the agency is being considered.

A succinct statement of the objectives of, and legal basis for the proposed rule.

A description of and, where feasible, an estimate of the number of small entities to which the proposed rule will apply.

⁶ See Page 18, U. S. Small Business Administration, Office of Advocacy, "The Regulatory Flexibility Act: An Implementation Guide for Federal Agencies." 1998.

A description of the projected reporting, record keeping and other compliance requirements of the proposed rule, including an estimate of the classes of small entities which will be subject to the requirements of the report or record.

An identification, to the extent practicable, of all relevant Federal rules, which may duplicate, overlap or conflict with the proposed rule.

Each IRFA shall also contain a description of any significant alternatives to the proposed rule which accomplish the stated objectives of applicable statutes and which minimize any significant economic impact of the proposed rule on small entities. Consistent with the stated objectives of the applicable statutes, the analysis shall discuss significant alternatives such as:

The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities.

The clarification, consolidation, or simplification of compliance and reporting requirements under the rule for such small entities.

The use of performance rather than design standards.

An exemption from coverage of the rule, or any part thereof, for such small entities.

The IRFA should estimate all costs associated with each of the selected alternatives and identify the classes of small entities that will be subjected to the costs. The relevant costs include both direct compliance costs, reporting, record keeping, and other administrative costs. Note that compliance costs are broadly defined to include the value of forgone fishing opportunities, increased operating costs, and costs associated with higher levels of debt servicing. The IRFA should compare the costs of compliance for small and large entities to determine if any small entities are disproportionately affected. If all entities in the industry are small entities, the costs imposed on the *typical*, representative, median, or average entity in a particular segment of the industry should be analyzed. The resulting effects of business closures on production and employment in each segment should be estimated. The effects on participants in other fisheries in terms of disruption of fishing practices and dislocation from customary fishing locations should be considered in the RIR if those entities are not directly regulated by the proposed action. Also, the effects on related wholesale and service industries should be considered in the RIR if those entities are not directly regulated by the proposed action. This should be done for each selected alternative considered to the extent practical.

The discussions in the following two paragraphs refer to process rather than analysis. Since the regulatory development process varies by region, in some cases the analyst would not be involved in the process described below. In other cases where the analyst is a council staff, he/she would likely be involved in this process.

As indicated above, the RFA requires consideration of alternatives that accomplish the stated objectives of the applicable statutes and that minimize any significant economic impacts on

small entities. The IRFA must identify all the significant alternatives considered that would minimize economic impacts on small entities. The RFA requires that the alternatives be part of the IRFA to ensure that the public will have adequate opportunity to comment on them and to suggest other alternatives. If there is an alternative with less of an impact on small entities, the IRFA should explain why the preferred was recommended rather than the alternative.

Rationale should be provided to justify any unavoidable adverse effects on small entities that are necessary to achieve the objectives. For documents that are prepared by the Councils, if a Council fails to fully comply with the RFA requirements for an IRFA, NMFS may elect to return a Council's recommendation as incomplete or may supplement a Council's IRFA submission by adding language to the preamble of the proposed rule. In such instance, the IRFA will be considered to consist of a Council's submission as supplemented by the preamble.

3. The Final Regulatory Flexibility Analysis

When an agency promulgates a final rule after being required by the Administrative Procedure Act or some other law to publish a general notice of proposed rulemaking, a Final Regulatory Flexibility Analysis (FRFA) must be prepared unless the agency certified that the rule, if adopted, will not have a significant economic impact on a substantial number of small entities. The FRFA must be published or summarized in the Federal Register, and made available to the public when the final rule is published. NMFS prepares the FRFA at the end of the public comment period.

Section 604 (a) of the Regulatory Flexibility Act provides the elements that should be in the FRFA:

A succinct statement of the need for, and objectives of, the rule.

A summary of the significant issues raised by the public comments in response to the IRFA, a summary of the assessment of the agency of such issues, and a statement of any changes made in the proposed rule as a result of such comments.

A description of, and an estimate of the number of small entities to which the rule will apply or an explanation of why no such estimate is available.

A description of the projected reporting, record keeping and other compliance requirements of the rule, including an estimate of the classes of small entities which will be subject to the requirement and the type of professional skills necessary for preparation of the report or record.

A description of the steps the agency has taken to minimize the significant economic impact on small entities consistent with the stated objectives of applicable statutes, including a statement of the factual, policy, and legal reasons for selecting the alternative adopted in the final rule and why each one of the other significant alternatives to the rule considered by the agency which affect small entities was rejected.

The FRFA may be based on the IRFA but must reflect new data, if any, developed during the comment period and comply with the above requirements. Often, in order to comply, the FRFA will consist of the IRFA and portions of the preamble to the final rule.

The remaining sections deal with process rather than analysis. Since the regulatory development process varies by region, in some cases the analyst would not be involved in the process described in the remaining sections. In other cases where the analyst is a council staff, he/she would likely be involved in this process.

V.2. Small Entities Compliance Guide

For each rule or group of related rules for which an agency is required to publish an FRFA, the agency is now required to publish one or more guides to assist small entities in complying with the rule. A Small Entity Compliance Guide (Guide) must explain the actions a small entity is required to take to comply with the rule or group of rules. The Guide is to be written using sufficiently plain language so that it can be understood by regulated small entities. An agency's Guide is not subject to judicial review. However, in any civil or administrative enforcement action against a small entity for a regulatory violation, the content of the Guide may be considered as evidence of the reasonableness or appropriateness of any proposed fines, penalties, or damages.

V. 3. Waiving or Delaying the Preparation of an RFAA

The requirement to prepare some or all of an IRFA may be waived or delayed by an agency head when an emergency makes compliance impracticable. To effectuate such a delay or waiver, a notice must be published in the Federal Register, not later than the date of publication of the final rule. That publication must include a written finding, with reasons therefore, that the final rule is being promulgated in response to an emergency that makes timely compliance with the requirements to prepare an IRFA impracticable.

An agency head may delay completion of an FRFA up to 180 days after the final rule is published in the Federal Register, by publishing in the Federal Register, not later than the date of publication of the final rule, a written finding, with reasons that the final rule is being promulgated in response to an emergency that makes compliance with the requirements to prepare an FRFA impracticable. Note that preparation of an FRFA may not be waived. The rule will lapse and have no effect if an FRFA is not prepared within this time period. Further, the rule may not be re-promulgated until an FRFA has been prepared.

V. 4. Relationship of the Regulatory Flexibility Act to Other Applicable Law

The Regulatory Flexibility Act requires that the agency identifies and considers alternatives that minimize the impacts of a regulation on small entities, but it does not require that the agency select any particular alternative such as the alternative with the least cost or with the least impact on small entities. Section 606 of the RFA (5 U.S.C 606) states that the requirements to prepare an IRFA and FRFA does not alter standards otherwise applicable by law to agency action. Regardless of the requirement to conduct an RFAA (or for that matter an RIR), the regulatory

action taken must be consistent with the Magnuson-Stevens Fishery Conservation and Management Act and other applicable law.

V. 5. Involvement of Small Entities in the Rulemaking

The Regulatory Flexibility Act mandates that, if a rule will have a significant economic impact on small entities, the agency involved will take steps to assure that small entities will have an opportunity to participate in the rulemaking. Possible steps suggested by the RFA include:

- \$ Providing a statement accompanying the advanced notice of rulemaking that the proposed rule might have a significant economic impact on a substantial number of small entities.
- \$ Publication of a notice in publications likely to be obtained by small entities.
- \$ Direct notification of affected parties, including representatives of participants in adjacent areas.
- \$ Conducting open conferences or public hearings, with consideration to including representatives of fisheries that might be affected by possible regulatory changes. The chances of public acceptance of fishery regulations are improved by involving all concerned/affected groups in all phases of the process, including data collection.

The Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA) process provides for public participation in FMP and amendment development. Public input (including small entities) is provided throughout the regulatory development process through Council members who represent coastal states, industry, environmental groups; Advisory Panels, Scientific and Statistical Committees, Social and Economic Panels, Plan Development Teams, and ad hoc committees that Councils or the Secretary appoint when necessary. Public notification of each of these meetings is required and public testimony is routinely taken. Further, some public meetings are recorded and meeting summaries may be prepared. A record of the number of opportunities for small entity input may be constructed by listing the dates and locations of each public meeting that was held where the proposed regulation was discussed. This record may be enhanced by including meeting summaries, attendance lists, and key issues identified by small entities. In many cases this will satisfy the RFA requirements for public input (which must be documented in the FRFA).

V. 6. Periodic Review of Significant Rules

Section 610 of the Regulatory Flexibility Act requires agencies to plan for the periodic review of rules issued by that agency which have or will have a significant economic impact on a substantial number of small entities. The purpose of this review is to determine whether such rules should be continued without change, amended, or rescinded, consistent with the stated objectives of the applicable statutes. In reviewing the rules to minimize any significant economic impact of the rule on a substantial number of small entities, the Regulatory Flexibility Act requires

consideration of the following factors:

- (1) The continued need for the rule;
- (2) The nature of complaints or comments received concerning the rule from the public;
- (3) The complexity of the rule;
- (4) The extent to which the rule overlaps, duplicates, or conflicts with other Federal rules, and, to the extent feasible, with State and local governmental rules; and
- (5) The length of time since the rule has been evaluated or the degree to which technology, economic conditions, or other factors have changed in the area affected by the rule.

Although it is not necessarily the responsibility of the analyst to conduct the periodic review, the analyst may be called upon to provide information needed for the review, specifically with regard to the first and last factors listed above.

Appropriate analysis during the early stages of a Council's or NMFS decision-making process, as proposed in these guidelines, will help to assure that the alternatives chosen will be the ones which appear most likely to achieve the management objectives. However, variability in environmental or biological factors, fishing effort and practices, markets, the condition of the economy, or other factors may lead to results that are different from what was expected when the management action was implemented. Monitoring the success of the management action and factors that influence that success would facilitate the periodic review of rules, but also provide the analyst and Councils with information about how to modify management objectives or regulations to be more effective when conducting analysis for proposed management actions.

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APPENDIX A: Summaries of Legislative Requirements of Other Applicable Law

Appendix A provides summaries of the legislative requirements for NEPA, Magnuson-Stevens Fishery Conservation and Management Act, Unfunded Mandates Reform Act, Congressional Review of Agency Rulemaking, Endangered Species Act, and Marine Mammal Protection Act.

National Environmental Policy Act

The National Environmental Policy Act (NEPA) (42 U.S.C. 4371 et seq.) requires a report on any proposed major Federal actions significantly affecting the quality of the human environment. The National Oceanic & Atmospheric Administration (NOAA) policy requires NEPA analysis for significant fishery actions, including fishery impacts on species protected under the Endangered Species Act and the Marine Mammal Protection Act, impacts on non-target fish species (e.g., bycatch or other incidental fishing mortality), and on fishery habitats.

Often, the first step in complying with NEPA is to conduct an Environmental Assessment (EA), which is a brief analysis of the environmental impacts of the proposed action and its alternatives, including sufficient evidence to determine whether the action may have a significant impact on the human environment. Alternatively, if it is clear that the proposed action will have significant impacts, the agency should prepare an Environmental Impact Statement (EIS) without first preparing an EA. If the EA indicates the action will have no significant impact, including economic impacts, on the human environment, a Finding of No Significant Impact (FONSI) is prepared. If the proposed action may result in significant impact on the human environment, an EIS is required. An EIS is a detailed report that describes the proposed action, the need for action, alternatives considered, the environment affected by the action, and the environmental consequences of the proposed action and reasonable alternatives (NOAA Administrative Order 216-6).

Magnuson-Stevens Fishery Conservation and Management Act and the National Standards

The Magnuson-Stevens Fishery Conservation and Management Act (MSFCMA) (16 USC 1801 et seq.) requires the development and implementation of conservation and management measures to prevent overfishing, rebuild stocks, and promote the long-term health and sustainability of fisheries. Under '303(a)(9), any fishery management plan must include a Fishery Impact Statement (FIS), which assesses, specifies, and describes the likely effects, if any, of the conservation and management measures on participants in the fishery or fisheries being managed, fishing communities, and participants in fisheries in adjacent areas. Analyses for FIS requirements should include assessments and descriptions of the economic and social impacts of the proposed action on various components of the fishery being managed, over the entire range of the regulated species, on participants in the fishery and in other fisheries, and on fishing communities.

Eight of the ten National Standards for fishery conservation and management have implications for economic analysis:

(1) National Standard 1 (50 CFR 600.310) requires that *Conservation and management measures shall prevent overfishing while achieving, on a continuing basis, the optimum yield from each fishery for the United States fishing industry;@ where optimum yield@ is defined in terms of the amount of fish which will provide the greatest overall benefit to the Nation.*

(2) National Standard 2 (50 CFR 600.315) requires that *Conservation and management measures shall be based upon the best scientific information available.@*

(3) National Standard 4 (50 CFR 600.325) requires that *Conservation and management measures shall not discriminate between residents of different states. If it becomes necessary to allocate or assign fishing privileges among various United States fishermen, such allocation shall be (A) fair and equitable to all such fishermen; (B) reasonably calculated to promote conservation; and (C) carried out in such manner that no particular individual, corporation, or other entity acquires an excessive share of such privileges.@*

(4) National Standard 5 (50 CFR 600.330) requires that *Conservation and management measures shall, where practicable, consider efficiency in the utilization of fishery resources; except that no such measure shall have economic allocation as its sole purpose.@*

(5) National Standard 7 (50 CFR 600.340) requires that *Conservation and management measures shall, where practicable, minimize costs and avoid unnecessary duplication.*

(6) National Standard 8 (50 CFR 600.345) states that *Conservation and management measures shall, consistent with the conservation requirements of this Act (including the prevention of overfishing and rebuilding of overfished stocks) take into account the importance of fishery resources to fishing communities in order to (A) provide for the sustained participation of such communities, and (B) to the extent practicable, minimize adverse economic impacts on such communities.*

(7) National Standard 9 (50 CFR 600.350) requires that *Conservation and management measures shall, to the extent practicable, (A) minimize bycatch; and (B) to the extent bycatch cannot be avoided, minimize the mortality of such bycatch.* NMFS has defined the term *to the extent practicable* to include a consideration of the effects of reducing bycatch and bycatch mortality on the overall benefit to the Nation.

(8) National Standard 10 (50 CFR 600.355) requires that *conservation and management measures shall, to the extent practicable, promote the safety of human life at sea.*

Unfunded Mandates Reform Act of 1995

The Unfunded Mandates Reform Act (UMRA) (P.L. 104-4) requires agencies to prepare a report if a Federal rule that includes a Federal mandate may result in the expenditure by State, local, and tribal governments in the aggregate, or the private sector, of \$100 million or more (adjusted for inflation) in any one year. The report must:

(1) Identify the Federal law under which the rule is being promulgated.

(2) Provide a qualitative or quantitative assessment of the anticipated costs and benefits of the mandate, including an analysis of the extent to which costs may be paid with Federal financial assistance and the extent to which there are available Federal resources to carry out the mandate.

(3) Provide estimates of the future compliance costs of the mandate, any disproportionate budgetary effects on particular regions, State, local, or tribal governments, urban or rural or

other types of communities, or segments of the private sector.

(4) Provide estimates of the effect on the national economy (e.g., on productivity, economic growth, full employment, creation of productive jobs, international competitiveness).

(5) Describe the agency's consultation with elected representatives of the State, local, or tribal governments.

(6) Summarize comments received.

(7) Summarize the agency's evaluation of the comments.

(8) Identify and consider a reasonable number of alternatives.

It should be noted that UMRA has a decisional criterion that the RFA does not have. A Federal agency is required to select the alternative with the least cost or with the least impact. Specifically, if a report is required, the agency must select the least cost, most cost effective or least burdensome alternative that achieves the objectives of the rule.

Congressional Review of Agency Rulemaking

Under the Congressional Review of Agency Rulemaking (5 U.S.C. 801 et seq.), prior to promulgating a rule, agencies are required to submit to each house of Congress and to the Comptroller General, a copy of a proposed rule, a statement as to whether it is a major rule, and the proposed effective date of the rule. If the rule is a major rule, the Comptroller General is required to report to Congress on whether the agency has complied with benefit-cost analyses required by E.O. 12866, the Unfunded Mandates Reform Act, the Regulatory Flexibility Act, and any other applicable law or Executive Order.

Endangered Species Act

Section 7 of the Endangered Species Act (ESA) (16 U.S.C. 1531 et seq.) requires Federal agencies to use their authorities to conserve endangered and threatened species. The ESA prohibits the consideration of economic impacts in making species listing decisions. Critical habitat necessary for the continued survival of a species is designated at the time a species is proposed for listing. The Act requires consideration of the economic impacts of critical habitat designation. Public comments are solicited before a final decision is made on the listing. When designating critical habitat or issuing rules to establish protective

measures, economic impacts must be considered. If a proposed fishery management action affects endangered species population, the potential impacts must be analyzed in an EA/EIS, as required by the National Environmental Policy Act (NEPA).

Marine Mammal Protection Act

The Marine Mammal Protection Act (MMPA) (16 U.S.C. 1361 et seq.) recognizes that certain species of marine mammals are in danger of extinction or depletion. It requires that measures be taken to replenish any species or population that has fallen below its optimum sustainable population.

APPENDIX B: Flow Charts describing the typical Regulatory Process

The Flowchart will be found as a separate document.

FISHERY MANAGEMENT COUNCIL ACTIONS

The flow chart above and the explanatory notes below provide a description of how the Council regulatory process typically works. It is not a recommendation on how it should work.

Problem Identification, Options Paper, Scoping & Public Input:

These steps are initiated when a problem is identified through the annual report to Congress on the status of fish stocks, results from stock assessments, environmental concerns, public comments, etc. The Council prepares a scoping document explaining the problem and provides a number of options for dealing with the problem. This document goes through the public scoping process to obtain public input on the options that would be considered for solving the problem.

Council Reviews Public Input, Approves Alternatives:

This process enables the Council to select alternatives (during Council meetings) to be included in the Fishery Management Plan (FMP) or amendment. Usually the options are narrowed down. Sometimes, new options are added.

Prepare Public Hearing Document, Preliminary Analysis, Public Hearing:

The alternatives are well defined. Sometimes a preferred alternative is selected. A preliminary analysis is prepared to indicate expected impacts of alternatives. A draft environmental assessment (EA), or draft environmental impact statement (DEIS) is prepared at this time. If a DEIS is prepared, it is published in the Federal Register (FR) with a 45-day comment period. Comments on the DEIS are sent to the Council.

Note that the Preliminary Regulatory Economic Evaluation (PREE) or similar analysis recommended in the guidelines should be done at this time.

The document is taken to a series of public hearings. The number of hearings depend on the nature of the problem and the geographic extent of the fishery under consideration. The Council's Scientific & Statistical Committee (SSC), Social & Economic Panel (SEP), Advisory Panel (AP), and similar groups review and provide comments on the draft document.

Council Reviews Public Comments, Selects Preferred Alternative, Approves Document for Secretarial Review:

This process could go through more than one Council meetings. Detailed economic analysis of the likely impacts of the alternatives should be available at this time. The analysis should be done to meet the requirements of E.O. 12866 and other applicable law. SSC, SEP, AP, and similar bodies meet to approve measures in the draft document. The Council takes public comment at the meeting where final vote is taken for submission of the document.

Formal Regulatory Flexibility Analysis Process:

Once the regulatory document is approved for Secretarial review, the analyst uses information provided in the economic analysis to determine whether there is factual basis to recommend certifying that the preferred alternative would not result in A significant economic impact on a substantial number of small entities.@ If this is possible, the analyst provides factual basis in the regulatory document. An IRFA is not prepared and the regulatory package is transmitted to the Regional Administrator. If there is no factual basis to recommend certification, the analyst prepares IRFA which is included in the package before transmittal. Note that the guidelines recommend that an IRFA be done for all proposed actions that are controversial.

Council Submits Regulatory Package for Secretarial Review:

This package could include the transmittal letter, final FMP, regular amendment, regulatory amendment, with FEIS (if DEIS was prepared), or annual specifications document; proposed rule, including the codified section of the rule. In some cases, the NMFS Region prepares the proposed rule with the concurrence of the Council.

Regional Administrator (RA) Reviews Regulatory Package:

During this review process, any serious deficiencies in the analytical supporting documents (i.e., lack of supporting analysis for PRA requirements, deficient IRFA analysis) for the regulatory package are resolved with the Council. Sometimes supplementary analysis/ documents are prepared.

RA Transmits Issues Advisory (IA) to Assistant Administrator for Fisheries (F):

When regulatory package is complete, RA sends IA to F providing summary of major features of the management measures, outlining any controversial issues, and an explanation of the controversy. If need be, there is discussion between HQ and RA to discuss and resolve issues. Once resolved, F signs off on

the IA and request that RA formally transmits regulatory package to HQ.

Formal Transmittal of Regulatory Package, Formal Review Process Begins:

The day the package is formally transmitted is the day the regulatory clock starts ticking. At this stage, the FMP/amendment begins tracking through one process and the regulations track through another process.

Notice of Availability Published in the Federal Register (FR):

FMP/Amendment - After a 5-day review period, a notice of availability (NOA) is published in the FR. A comment period is open for 60 days from the date of publication of the NOA. Public comments are received. Comments could affect approvability of measures proposed in the FMP/Amendment. At the end of the 60-day comment period, NMFS HQ has 30 days to approve, partially approve or disapprove the FMP/Amendment.

Regulations - During an initial 15-day period, NMFS (HQ and the Region) and NOAA General Counsel for Fisheries (NOAA - GCF) evaluate the proposed rule to make sure the measures it contains are consistent with the FMP/Amendment, the Magnuson-Stevens Fishery Conservation and Management Act and other applicable law.

If the determination is affirmative, then the proposed rule and its measures continue to be reviewed and processed by the Office of Sustainable Fisheries (F/SF) and NOAA - GCF for publication in the Federal Register. If the determination is negative, then NMFS on behalf of the Secretary of Commerce shall notify the Council in writing of inconsistencies and provide recommendations on revisions to make the proposed measures consistent with the FMP/Amendment, the Magnuson-Stevens Fishery Conservation and Management Act, and other applicable law (see Section 304 of the Magnuson-Stevens Act).

There is a 45-day comment period during which comments are solicited from the public. At the end of the comment period, the NMFS Region compiles all comments received and prepares responses to those comments. NMFS responds to all comments received on the FMP/amendment and the rule. These comments could pertain to MSFCMA including National Standards, E.O. 12866, IRFA, NEPA, and other applicable law. These comments and responses are included in the final rule. If an IRFA was prepared, an FRFA is now prepared. The FRFA should address comments pertaining to the IRFA and any changes in the analysis contained in the IRFA as a result of the comments received. The final rule is published 30 days after the end of the comment period. The final rule becomes effective 30 days after it is published in the FR unless there is a waiver of the 30-day period, or an extension of the 30-day period.

Initial OMB Clearance:

OMB does not always review rules, only those that it determines significant under E.O. 12866. NMFS prepares a listing document for OMB which indicates whether NMFS considers the rule to be significant or not. This is sent to OMB during the initial evaluation of the proposed rule (15-day period). If OMB concurs with NMFS that the rule is not significant, the OMB process ends at this point. OMB can over rule on NMFS determination. If the rule is significant, OMB advises Office of General Counsel /Department of Commerce (OGC/DOC) and OGC/DOC informs NMFS. OMB has to give clearance before any proposed rule that is determined to be significant is published. When the rule is determined to be significant, the analysis goes through more scrutiny by OMB to ensure that the requirements of E.O. 12866 are met. If any part of the required analysis is missing, OMB requests additional analysis to correct this deficiency. If OMB determines that the rulemaking is significant under E.O. 12866, it also reviews and clears the final rule before it is published in the Federal Register. OMB usually reviews the rule only, but occasionally requests the FMP or amendment.

Small Business Administration (SBA):

The proposed rule and the IRFA (if one was prepared), or the certification letter (if the agency decides to recommend certification to OGC/DOC) are sent to the Chief Counsel for Advocacy of the Small Business Administration, the same time the proposed rule is sent to the OFR for publication in the FR. SBA has 45 days to comment.

The flowchart will found as a separate document.

HIGHLY MIGRATORY SPECIES FISHERY MANAGEMENT ACTIONS

The flow chart above and the explanatory notes below provide a description of how the Highly Migratory Species (HMS) regulatory process typically works. It is not a recommendation on how it should work.

Problem Identification, Scoping Document & Preliminary Analysis:

These steps are initiated when a problem is identified through the annual report to Congress on the status of fish stocks, results from stock assessments, environmental concerns, public comments, etc. The HMS Division within the Office of Sustainable Fisheries (F/SF) prepares a scoping document explaining the problem and provides a number of options for dealing with the problem. A preliminary economic analysis of the expected impact of the options is also prepared. Note that the Preliminary Regulatory Economic Evaluation (PREE) or similar analysis recommended in the guidelines should be done at this time.

Scoping and Public Input

This document goes through the public scoping process to obtain public input on the options that would be considered for solving the problem. This process enables the HMS Division to select alternatives to be included in the Fishery Management Plan (FMP) or amendment. Usually the options are narrowed down. Sometimes, new options are added.

Prepare Draft Fishery Management Plan or Amendment:

The alternatives are well defined. A preferred alternative is selected. A draft environmental assessment (EA), or draft environmental impact statement (DEIS) is prepared at this time. If a DEIS is prepared, it is published in the Federal Register (FR) with a 45-day comment period.

The analyst uses information provided in the preliminary economic analysis to determine whether there is factual basis to recommend certifying that the preferred alternative would not result in A significant economic impact on a substantial number of small entities.@ If this is possible, the analyst provides factual basis in the regulatory document. The document is submitted for publication of the notice of availability in the Federal Register without preparation of an IRFA. If there is no factual basis to recommend certification, the analyst prepares an IRFA which is included in the package. Note that the guidelines recommend that an IRFA be done for all proposed actions that are controversial.

Formal Transmittal of Regulatory Package, Formal Review Process Begins:

The day the package is formally transmitted is the day the regulatory clock starts ticking. At this stage, the FMP/amendment begins tracking through one process and the regulations track through another process.

Notice of Availability Published in the Federal Register (FR):

FMP/Amendment - After a 5-day review period, a notice of availability (NOA) is published in the FR. A comment period is open for 60 days from the date of publication of the NOA. Public comments are received. Comments could affect approvability of measures proposed in the FMP/Amendment. At the end of the 60-day comment period, NMFS HQ has 30 days to approve, partially approve or disapprove the FMP/Amendment.

Regulations - During an initial 15-day period, NMFS and NOAA General Counsel for Fisheries (NOAA - GCF) evaluate the proposed rule to make sure the measures it contains are consistent with the FMP/Amendment, the Magnuson-Stevens Fishery Conservation and Management Act and other applicable law. If the determination is affirmative, then the proposed rule and its measures continue to be reviewed and processed by the Office of Sustainable Fisheries (F/SF) and NOAA - GCF for publication in the Federal Register. If the determination is negative, then the HMS Division is notified in writing of inconsistencies and is provided with recommendations on revisions to make the proposed measures consistent with the FMP/Amendment, the Magnuson-Stevens Fishery Conservation and Management Act, and other applicable law (see Section 304 of the Magnuson-Stevens Act). There is a 45-day comment period during which comments are solicited from the public.

Advisory Panel Reviews Public Comment

At the end of the public comment period, the HMS Division compiles all comments received. The HMS Advisory Panel (AP) is convened. The AP reviews public comments and makes recommendation to the HMS Division. The HMS Division prepares responses to comments received on the FMP/amendment and the rule.

These comments could pertain to MSFCMA including National Standards, E.O. 12866, IRFA, NEPA, and other applicable law. These comments and responses are included in the final rule. If an IRFA was prepared, an FRFA is now prepared. The FRFA should address comments pertaining to the IRFA and any changes in the analysis contained in the IRFA as a result of the comments received. The final rule is published 30 days after the end of the comment period. The final rule becomes effective 30 days after it is published in the FR unless there is a waiver of the 30-day period, or an extension of the 30-day period.

Initial OMB Clearance:

OMB does not always review rules, only those that it determines significant under E.O. 12866. NMFS prepares a listing document for OMB which indicates whether NMFS considers the rule to be significant or not. This is sent to OMB during the initial evaluation of the proposed rule (15-day period). If OMB concurs with NMFS that the rule is not significant, the OMB process ends at this point. OMB can over rule on NMFS determination. If the rule is significant, OMB advises Office of General Counsel /Department of Commerce (OGC/DOC) and OGC/DOC informs NMFS. OMB has to give clearance before any proposed rule that is determined to be significant is published. When the rule is determined to be significant, the analysis goes through more scrutiny by OMB to ensure that the requirements of E.O. 12866 are met. If any part of the required analysis is missing, OMB requests additional analysis to correct this deficiency. If OMB determines that the rulemaking is significant under E.O. 12866, it also reviews and clears the final rule before it is published in the Federal Register. OMB usually reviews the rule only, but occasionally requests the FMP or amendment.

Small Business Administration (SBA):

The proposed rule and the IRFA (if one was prepared), or the certification letter (if the agency decides to recommend certification to OGC/DOC) are sent to the Chief Counsel for Advocacy of the Small Business Administration, the same time the proposed rule is sent to the OFR for publication in the FR. SBA has 45 days to comment.